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# Global Tangles: Laws, Headcoverings and Religious Identity

Seval Yildirim

Although contemporary international human rights law is centered upon individual dignity and liberation, it increasingly accepts and even seeks State control of human conduct, albeit to provide protection to those it deems weak. Increasing control of the human individual's physical being, the body, is part of this increasing control. From identifying the human individual in various ways to demanding that the State take charge of regulating her conduct, the liberationist ideal of human rights discourse has born a State increasingly regulatory and punitive.

Whether one finds liberty under a headcover or finds oppression because of it, current discourses seeking to explain and understand why a woman might cover her hair, or why Islam might involve covered hair, or why a woman could never willingly choose to cover her hair, all miss the most troubling part about laws that either mandate or prohibit headcoverings. From a human rights perspective, the most troublesome aspect of all these laws is that they regulate the female body, and regulate it in the name of grand narratives such as religion, national identity and perhaps the most troublesome, in the name of women's rights and gender equality.

Few, if any, parts of the human body have been more politicized and its regulation more legitimized in the name of human rights than the Muslim woman's hair. Since the late nineteenth century Muslim women's hair has been at the center of discourses surrounding secularism and modernity in the Middle East, in the midst of formulations of national identity in a number of Muslim-majority contexts (such as Turkey and Egypt), a focus of colonialist discourses, a point of justification for feminist projects, just to name a few. Muslim woman's hair is said to constitute a religion's symbol of freedom and a threat to democracy when covered, or a nation's identity and a symbol for women's rights when revealed. Despite the fact that Muslim women are not alone in covering themselves for religious belief, they have been the subjects of socio-politico-legal discourse and State regulation more than any of their counterparts.<sup>1</sup>

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1. For example, various sects of Christianity and Judaism also believe that women must dress modestly and many practicing female adherents cover their hair. In other parts of the world, such as parts of India, non-Muslim women cover their hair to follow tradition and local custom.

This paper inquires why Muslim women have received this special attention by questioning certain propositions posed as truisms in the discourses surrounding *hijab*.<sup>2</sup> This paper is about international law's inadequacy to meaningfully comprehend and address the complexity of the issues Muslim covering women face in liberal democracies. Women in question are those who dare to cover their hair out of piety and seek to participate in public space in liberal democracies. To quote Foucault, they are those who "upset[] established laws and somehow anticipate[] the coming freedom."<sup>3</sup> This paper is also about the complexity and the simultaneous banality of the discourses surrounding the Muslim woman's hair and liberal-ideology-born international law's inherent and proven inadequacy in dealing with the challenge posed by the covered Muslim woman's hair in what is referred to, in liberal jargon, as public space. The visibility of a woman's hair is one of those universal concerns that have gone beyond temporality, contextuality, locality, and ideology. Whether in an effort to make a woman's hair visible or to hide it from others' gaze, woman's hair has been a political, religious, and legal focus of various discourses for at least the last two centuries.

Because political movements have made a cause of Muslim women's hair, and because people have mobilized around what to do with it, many scholars have written volumes on the subject. Some have found oppression in head coverings, applauding laws that prohibit them, claiming to speak in the name of women's rights. Others have explained the reasons why women might choose to cover their hair for religion, emphasizing choice, and religious freedom and individual liberty. Yet others have explained that Islam is a religion of liberation, that its revelation improved women's condition in its place of reception in the Arabian Peninsula. The Bush administration made the *burqas* of Afghani women one of the central pieces of its military projects in Afghanistan and even in Iraq. Yet others wrote about the various methods of interpreting Islamic legal sources so as to emphasize that Islam does not necessitate head coverings, but simply modesty. And in response, others objected and demanded that Muslim women must cover their hair. From self-acclaimed feminists and human rights activists to self-acclaimed experts on Islam and Muslims, many have offered an opinion on the matter. From oppression to liberation, woman's hair is very much the political powder keg, increasingly fueled and lit by laws passed and enforced by the State in various contexts.

Headcovering-prohibitive laws invariably do so in the name of women's rights and a range of liberationist ideologies (individual freedoms, right of the public to be free from religious coercion trumping individual women's religious rights, etc.). This paper seeks to focus on this paradox—prohibiting an act that poses no discernable harm to the individual or others in

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2. Muslim women's headcoverings vary based on location, belief, and sect, among other variables. In this paper I use the term *hijab* to refer to a wide variety of these headcoverings. In the Turkish case, I use the term headscarf as the debates revolve primarily around a piece of scarf tied around the head and the neck. To refer to clothing that cover the entire body and the face, I use the term veil. See generally FADWA EL GUINDI, *VEIL: MODESTY, PRIVACY AND RESISTANCE* (1999); see also Heather Marie Akou, *Building a New World Fashion: Islamic Dress in the 21st Century*, 11 *FASHION THEORY* 403, 403-21 (2007), for further discussion on the variety of Muslim hair and body coverings and the various terms used in different contexts to refer to them.
  3. MICHEL FOUCAULT, *1 HISTORY OF SEXUALITY* (Random House Inc. trans., Vintage Books ed. 1990) (1976).

society in the name of liberal democratic principles of individual freedom and feminist consciousness.

Today the Muslim woman is faced with the absurd reality where she is the subject of laws and regulations that either mandate her to cover her body in specific ways, or to uncover her hair in order to participate in public space. This absurdity is a product of at least three historical occurrences. First, it is an extension of Orientalist discourses produced in the last few centuries in order to create a distinct and superior Western Christian identity and to justify colonialist projects. Second, this absurdity is a product of the dominant feminist narratives in international human rights discourses, where the only liberated woman is one that rejects tradition and religion. Third, the evolving and escalating nature of the absurdity faced by the covered Muslim woman is fueled by the post-9/11 discourses that have made a questionable subject of Islam and Muslims in need of moderation and reform to comply with international law and international human rights. In this post-9/11 context, two primary personas have emerged as representative of things Islamic and Muslim: the Muslim terrorist man that needs to be identified and eliminated, and the oppressed covered Muslim woman that needs to be woken up, saved and, if she refuses, removed from public space. This paper focuses primarily on the latter two occurrences, concluding with a review of the recent jurisprudence from Turkish Constitutional Court and the European Court of Human Rights.

In Part I, I argue that covered hair must be viewed in light of the power-dynamics surrounding international and various national politics. Although identity politics surrounding covered hair, or the covered Muslim woman, are especially stark since the events of 9/11, the discourses that led to the distinct persona of the covered Muslim woman can be traced back to an earlier era of European colonialism, images of the savage Oriental (referring in this context to its original meaning covering the Ottoman Empire, extending to Africa and South Asia). To make this point, I borrow from Michele Foucault the idea that power operates not in a top down manner but through discourse<sup>4</sup> and various personas are constructed through discourse, not despite the resistance of those whose identities are formed, but through their participation in the origination discourses. Similar to Foucault's analysis regarding sexual identities, I argue that the covered Muslim woman as a distinct persona emerged as a result of the Orientalist discourses in the 18<sup>th</sup> and 19<sup>th</sup> centuries, which discourses were accepted, honed and adopted by the nation-building elites in a number of countries in the Middle East, and elsewhere in Muslim-majority contexts. What is additionally triggered is an inquiry about the purpose of founding laws in the inception of a nation. I argue that the nation-building elite in these countries viewed law as an instrument of power, and as a tool to shape the new society in the image of what they perceived to be civilization, or in their imaginary, Christian Western Europe where women's hair remained visible. Further, as a result of the accepted and (through new laws) enforced norm of the revealed hair, the covered Muslim woman was rendered a member of the periphery of the social order. Those on the periphery are the ones whose identities are most starkly formulated, discussed and are the subject of discourse. I argue that this peripheral

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4. *Id.*

positioning of the covered Muslim woman meant that she would remain at the center of debates about national identity, progress, liberation, uniformity, and conformity to power.

In Part II, I turn to the development of what I have elsewhere referred to as the post-9/11 epistemological terrain,<sup>5</sup> wherein the covered Muslim woman has emerged as a primary representative of Islam and Muslims, and the focus of curiosity and inquiry. In my discussion of hijab-prohibitive laws, I focus primarily on Turkey, as it most starkly demonstrates that identification with a country's demographic majority (Muslim) might not prevent one (hair-covered Muslim woman) from being forced to the periphery of socio-political formation. I discuss the jurisprudence of the Turkish Constitutional Court (TCC), which has consistently blocked every legislative effort to lift the headscarf ban in higher educational institutions since the 1980's. The Turkish covered woman as a persona emerges as the product of discourses surrounding what it means to be a liberated woman, a feminist, a female citizen of a civilized or modern nation, almost solely responsible for the survival of the secular politico-legal nature of the State.

In Part III, I argue that from its legal documents to court decisions, international human rights discourse is inadequate to comprehend and deal with the complexity of identity so as to provide adequate protection to the covered Muslim woman. I focus on the jurisprudence of the European Court of Human Rights (ECHR), and particularly the case of *Sahin v. Turkey*, where the ECHR held that although Turkey was in violation of freedom of conscience, the breach was justified in Turkey's attempt to battle Islamic fundamentalism and maintain a secular state.

In conclusion, I emphasize the need to approach the headscarf discourse from a critical place questioning power, its covert and overt mechanisms of politics, law and even military might. The cases from TCC and the ECHR are strikingly similar in their reasoning that the Muslim woman's hair lies at the heart of the struggle against those elements seeking to overthrow secular states, and worse, Islamic fundamentalist forces leading to international terrorism. A few concepts recur in both courts' jurisprudence upholding prohibition: neutrality, public vs. private space (wherein religion and its overt exercise is regulated in public space in the name of public good), individual rights, rights of the few vs. public good or public interest in maintaining a secular (synonymously used as the most free) space and state. I conclude that the international human rights discourse has been unable to address the complexity of the headscarf disputes mainly because it reflects a very liberal bias, as well as a Western European and North American contextual bias—in other words, the legal mechanisms through which international human rights are defined, articulated and in turn protected or rejected today in international law is very much the product of flawed mechanisms that have at times led to the prohibition of headscarves in various countries around the world, whose domestic legal structures are founded on liberal democratic principles of inescapable difference, inescapable identity that places individuals in categories, and the very concept of equality which is necessarily based on inherent differences.

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5. See Seval Yildirim, *Discussing Islam in the Post-9/11 Epistemological Terrain*, 19 PACE INT'L L. REV. 223 (2007).

## Part I: Questioning International Human Rights Discourse

Contemporary international human rights discourses are based on a few primary presumptions. The first presumption is that liberal democratic ordering of society is the just order and if applied fully across society, it produces the most just society with the most equitable outcomes, given the potential difficulties of pluralistic societies. Second, gender equality is an inherent aspect of contemporary international human rights discourse, where gender and gender injustice can be defined in global terms. In other words, women around the world can be considered one indivisible group, historically silenced and oppressed by men. Thus, the solution offered by international human rights discourse must be global: men and women are equal, and the State and the law cannot support or uphold conduct that contradicts this equality. Certain conduct (like covering hair) is in turn understood to be oppressive and demeaning to women, and must therefore be prohibited so that it can eventually be eradicated.<sup>6</sup> Third, covering certain parts of a woman's body is acceptable, while socio-cultural and religious and legal systems demanding that women cover their hair are oppressive and unacceptable in secular democracies upholding values of gender equality. A woman with covered hair cannot be a woman equal, whereas demanding that women uncover other parts of their bodies (such as their chest) would be coercive, violent and unacceptable in a liberal democratic society valuing gender equality.

Law, with all its variables and various bodies, from legislatures to courts to law enforcement agents, defines and recognizes its objects through identity. In other words, each subject, or each citizen, is assigned an identity, no matter how imaginary or unstable. The very basis of these identities is the individual or the individual citizen within the jurisdiction of the law. Then the law creates layers of identity for the individual citizen.<sup>7</sup> Religion is one of those identities. In liberal democratic legal systems, including international law, it is based on these identities that egalitarianism is achieved: equality is measured by looking to see whether individuals with their various identities are equal to others in society. Identity is about being distinguished as either belonging to a group or as the other, the outsider. In other words, "identity itself only makes sense in juxtaposition with alterity."<sup>8</sup> In essence, every belonging is also an exclusion.

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6. Recognizing that cultural relativist arguments are often triggered in order to subjugate not just women but entire populations, my goal here, or anywhere in the paper, is not to engage in a cultural relativist critique of universal values. Rather, I want to point out that the international human rights discourse has inherent assumptions that are not always sustainable when the facts on the ground are considered. *Hijab* and other lived experiences of Muslim women, especially in non-Muslim-majority contexts, prove the difficulty of sustaining rigid feminist presumptions about the universality of female subjugation. There are certainly contexts and instances where Muslim women and girls are forced to cover their hair by their families and communities. However, that coercion exists in some cases cannot render every instance of the covering the result of coercion. Nor does the reality of coercion in some cases and contexts justify State mandated coercion to uncover hair.

7. Although there is invaluable critical scholarship on intersectionality of various identities, here I mean something different. Whereas intersectionality speaks of an individual with various identities, I question the very reality of identity rather than seek to recognize the varieties, overlap and interconnectedness of various identities of an individual.

8. IRVIN C. SCHICK, *THE EROTIC MARGIN: SEXUALITY AND SPATIALITY IN ALTERITIST DISCOURSE* 21 (1999).

Yet identity, including religious identity, is not produced through a top-down process but rather is produced and reproduced through the workings of Power over time, space and context. Contemporary international human rights discourse takes a flawed approach to understanding Power, and consequently fails to recognize the complexity of workings of Power, of identity as a politico-legal reality, of specific identities, of the limits and the capabilities of the Law as the instrument of State Power, and agency and contribution of those it deems oppressed in the workings of Power and identity formation.

Contemporary international human rights discourse has identified certain personas as those whose rights have been historically and systematically violated, and in need of international protection. To fulfill the project of saviorship, international human rights documents are framed around the protection of those identified as victims. Women, as an identifiable, globally unified group constitute one of these personas. The general tone of international human rights documents do not target erasing “gender” as a category of identification, but rather highlight that there is an inherent gender binary as part of the human reality (male and female) and women must be protected. For instance, Convention on the Elimination of All Forms of Discrimination against Women crystallizes this approach.

These conventions, and the body of international law produced from decisions made by utilizing these conventions, reflect a very specific feminist position which identifies an inherent gender binary (female and male), presumes that invariably and universally men dominate women, and that any human rights effort must begin from these presumptions and stand to save the oppressed woman.<sup>9</sup> Janet Halley refers to this feminism as governance feminism.<sup>10</sup> Halley argues that governance feminism has won many battles, such as in workplace sex discrimination and custody laws, and that in certain contexts it is no longer a male narrative that governs but rather women have the dominant authority. Moreover, governance feminism has utilized state apparatuses to achieve its goals through legislation, case law and enforced punishments.<sup>11</sup>

According to governance feminism, framed by Catherine MacKinnon, among other scholars and juridical bodies, male domination is in every aspect of everyday life, from the way individuals view themselves as men and women, to various state structures including modes of governance and laws. Accordingly, power is male and its workings invariably benefit men to the detriment of women. Women are oppressed by and suffer at the hands of male laws, male religions, male jurisprudence, and generally male-defined social norms. International law is no different, and it at best falls short of recognizing and meeting the need to disrupt and destroy male dominance. In this view, women as a global collective identity have a reality that is silent because silenced, unheard because subjugated, lived in similar patterns because similarly oppressed by systems in nature male, and unseen because only the silenced women themselves can access this reality. Although discontent with the maleness of Law, governance feminism wants to utilize law to undo male dominance and improve

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9. See generally CATHARINE MACKINNON, ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES (2007).

10. See generally JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006).

11. *Id.*

women's status globally. To this end, governance feminism has argued to change the law to include punishments for male misconduct and female complicity.

Governance feminism is a totalizing ideology—both because it assumes totality of male dominance, rejecting the possibility of female choices and spaces and meaning, and because it assumes all women are the same and want and desire the same things. Thus subjugation and liberation from it are common causes for all women. For instance, in a speech she delivered in Istanbul, the Egyptian feminist Nawal al-Saadawi said, “They are not interested in our hair. They want to blind us, blind our minds. That is why our slogan is ‘to lift the veil on our minds.’”<sup>12</sup>

Saadawi's words imply that there is a male conspiracy to imprison women in ignorance, to trap minds under headscarves and veils, and to trap sexuality under long coats. The sentiment behind these words also implies that women, collectively, oppose covering their hair out of religious conviction. It further agrees with the male-centric view that religion is the man's domain and women have no place there. In this view, women and religion exist in different spheres at best, and in opposing spheres at worst. To the extent that male oppression of women is identified, dismantling it may, and perhaps must, employ laws that prohibit any resemblance of women's acceptance of male oppression. In other words, the feminist project is comfortable with governance, and with State imposition of new (presumably woman liberationist) norms, including, and perhaps primarily that of revealing Muslim woman's hair.

It is this governance feminism that international law and its human rights conceptualizations are plagued with today. Although governance feminism has benefited women in certain instances (such as the marital last name laws in Turkey),<sup>13</sup> there is an urgent need to heed Janet Halley's call to take a break from this feminism in international law and hear the voices of covered Muslim women whose voices have been silenced by governance feminism. Liberal conceptualizations of identity coupled with the rigidity and blind fervor of governance, feminism has led to not only various national laws prohibiting women's headcoverings in public space, but they have also led to ECHR decisions upholding such prohibitive laws.

When thinking about *hijab* prohibitive laws, taking a break from governance feminism and international law's acceptance of it would create the possibility of perceiving the religious covered Muslim woman as an intelligent, self-aware agent making meaningful choices about her body. Moreover, it would allow for the recognition that not all women are the same or even similar and that not all women experience oppression and subjugation in the same or even similar ways. Finally, it would allow for the possibility that sometimes some women's oppression and subjugation as women might be the product of governance feminism. This is not to suggest that feminism is never necessary or useful. Rather, a feminism that always presumes women must look and act alike to be gender equal, applies universal norms born of

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12. Nawal al-Saadawi, *Arap Kadinlari ve Siyaset Uzerine Dusunceler* (Thoughts on Arab Women and Politics), *KADINLAR VE SIYASAL YASAM* (WOMEN AND POLITICAL LIFE), 143-151 (1991).

13. See *Unal Tekeli v. Turkey*, App. No. 29865/96 (2004) (holding law mandating that Turkish women had to take their husbands' last names (at least in hyphenated form) violated gender equality).



specific (European) contexts to all women globally, and a feminism that employs State punitive mechanisms is not always good for all women, and at times might even be harmful to some. When feminism turns into State paternalism and State violence through prohibitive laws, then it could only benefit women to take a break from feminism.

### ***The Truth about Hair***

In order to appreciate the complexity, and yet the offensive banality, of the discourses surrounding Muslim woman's hair, it is necessary to talk about habit—habitual acceptance of what has become truth. Not because of any established proof or an objective set of facts establishing a reality which we could refer to as truth, but rather a set of propositions, emotional conclusions, derivatives of fear-ridden illogic and normative conduct as a result of the workings of Power. To that end, the controversies over Muslim headcoverings constitute a moment of different regimes of Truth trying to establish hold over the Muslim woman's body.

On the one hand, traditional interpretations of Islamic law mandate that a woman's hair be concealed in the name of modesty so as to maintain social order, constantly at risk from the sexual urges of human beings. On the other, Western ideological norms mandate that it be revealed in the name of human rights, women's rights and public good.<sup>14</sup> How this regime of truth has placed Muslim woman's hair in the midst of its very survival requires the following points of inquiry: First, what is it about a woman's (any woman's) hair that demands regulation in a systematic manner, through law, enforcement and even punishment? In other words, why is hair different and distinct from other body parts? Second, how has a regime of truth been established wherein freedom, liberation, meaningful choice, and female strength is associated with revealed female hair, and oppression, subjugation, lack of choice and weakness is associated with covered female hair? Third, how can a woman's headcovering be so strong a symbol of violence and terror that it must be outlawed in certain contexts? Fourth, why is the intention of the woman covering her hair relevant to the legitimacy of a prohibitive law? And, finally, why are laws claiming universal application, international human rights instruments and juridical bodies unable and/or incapable of recognizing the need to dismantle the current regulation over female hair, be it to mandate women to cover or to reveal it?

Current debates surrounding Muslim female headcoverings in liberal democracies create a false dichotomy whereby only covered hair is regulated. Consequently only a demand to cover hair is oppressive, political, a potential instrument of disruptive and even violent Muslim movements, and a general threat to the permissive environment for all that secularism creates. As is discussed in further detail below, these presumptions are at the heart of the arguments put forth by legislatures passing prohibitive laws, and they are accepted and upheld by both domestic courts, and international juridical bodies, specifically the ECHR.

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14. I recognize the problems born of using "Western" to refer to a variety of contexts, which might be rather different from one another. However, this term remains useful to identify the development of the liberal ideology that has impacted legal and political norm-creation not only in Northern America and Western Europe but increasingly throughout the rest of the world, through adoption and, at times, wholesale importation of Western European and American laws reflecting ideas of liberal philosophy as a regime of truth.

The responses given to these points have revolved around explanations of why the headcovering or the body veil might be a mode of safety for some women, explaining the return to veiling practices, or they have focused on liberal democratic values such as freedom of conscience, freedom of belief and exercise, and equal protection of the laws. Other responses have focused on refuting arguments that most, if not all, Muslim women and girls are forced to cover their hair and/or bodies, and have emphasized stories of Muslim women willingly covering their hair while maintaining notable professional careers.

These arguments fail to recognize that they are essentially different faces of the same coin, and none of the arguments question the existence of the coin in the first place. For instance, what would an alternative reality look like where the norm is covered hair and revealed hair is the deviation from the norm? In Foucault's terms, what if the regime of truth was such that revealed hair seemed burdensome on women, and was perceived as an international human rights problem, which could even be used to justify military operations? Today, the covered Muslim woman in secular democracies is a peripheral identity whose self-awareness and self-esteem is presumed to be lacking, whose choices are presumed to be compromised by complicity in patriarchal religious systems, whose intelligence is questioned, and whose loyalty to global sisterhood for liberation is presumed non-existent. Given that religious Muslims in secular democracies already constitute peripheral identities, covered women are often on the periphery of the periphery of society.<sup>15</sup> The current discourse regarding *hijab* overlooks the complex historical, social, and even religious meaning that may be attached to covered hair or body.

In secular democratic contexts with *hijab* prohibitive laws, the courts have failed to recognize these complexities attached to the *hijab*. The courts and legislatures have chosen to remain ignorant about discourses that have questioned conventional wisdom about the *hijab*. For instance, Leila Ahmed has pointed out that *hijab* evolved as a symbol of resistance to colonialism in 19<sup>th</sup> century Egypt,<sup>16</sup> while Joan Wallach Scott has written about the racist and xenophobic conceptualizations of Islam and *hijab* in the French context.<sup>17</sup> Recognizing the possibility of covered hair, as not necessarily gender oppression, but an instance of resistance and self-distinction, would transform the discourse on *hijab* in secular democracies. Such recognition would create new dimensions of thinking about human dignity that goes beyond gender equality guaranteed through punitive measures and religious freedom gained by totalizing understandings of what each religion must mean to all its adherents.

## Part II

Admittedly, simply talking about the norm and deviation only immediately explains those contexts where the Muslim woman is a member of the minority group, *i.e.*, a context where

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15. See Seval Yildirim, *The Search for Shared Idioms: Contesting Views of Laiklik Before the Turkish Constitutional Court*, in *MUSLIM SOCIETIES AND THE CHALLENGE OF SECULARIZATION: AN INTERDISCIPLINARY APPROACH* 235 (Gabriele Marranci ed., 2010) (arguing that religious Muslims in Turkey constitute a peripheral identity).

16. LEILA AHMED, *WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE* (1992).

17. JOAN WALLACH SCOTT, *THE POLITICS OF THE VEIL* (2007).

Muslims are a religious minority. If that is so, how do prohibitive Muslim-majority contexts fit into the global picture? *Hijab* prohibitive laws also exist in Muslim-majority countries such as Turkey, Tunisia, Egypt, Azerbaijan, and Tajikistan, all with differing forms and degrees of liberal democratic political systems.

### **Hijab Prohibitive Laws: The Case of Turkey**

One point highlighted by the current headscarf discourses is worth repeating: not all Muslim women cover for the same reasons, nor do they cover in the same manner. Context and subtext matter. Perhaps a rather stark absurdity in the prohibitions on headscarves is the set of laws and political battles in Muslim-majority contexts. Since the 1980's, Turkey has promulgated regulations and laws that prohibit headscarves in public education institutions and government offices. Various laws have been enforced with varying degrees of strictness, but the debate continues to this day. Interestingly, the primary case from the ECHR, *Sahin v. Turkey*, which upholds prohibitive laws, concerns the Turkish ban.<sup>18</sup> While it might be easier to analyze the prohibitive laws in Western European countries like France and Belgium by references to xenophobia and racism, the Turkish case presents a more complex picture.

The majority of Turkey's population is Muslim.<sup>19</sup> According to a 2006 study, approximately half of Turkish women cover their hair in various forms, albeit in greater numbers in rural areas.<sup>20</sup> This alone does not indicate the exact number of women subject to prohibitive laws, as many Turkish women of older generations cover their hair out of tradition, and also out of tradition, they do not seek careers outside the home.<sup>21</sup> As the subsequent brief historical survey of Turkey's *hijab* debates indicates, the prohibitive laws in public space coincide with socio-political mobility, and urbanization, bringing traditional women (among other groups) into the public space (including universities and public offices) specifically. Hakan Yavuz argues that although shifts in Turkish socio-political mobility can be traced as far back as the 1960's, the major transformative shift occurred following the 1980 military coup.<sup>22</sup> This transformative shift in turn led to "the new liberal political opening conceded by the secularist state and the subsequent appropriation of these new opportunity spaces by Islamist groups and intellectuals."<sup>23</sup> In other words, a Muslim woman's demand to cover her hair while participating in public space in a secular liberal democracy is very much a product of modernity and the socio-political space created by secular liberal democratic ideals.

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18. Leyla Sahin v. Turkey, App. No. 44774/98, Eur. Ct. H.R. (2005).

19. Official records include all who are born to Muslim-identified parents, as well as Bahais. See generally Yildirim, *supra* note 15, for a critique of official records including individuals who do not identify as Muslim.

20. ALI CARKOGLU & BINNAZ TOPRAK, DEĞİŞEN TÜRKİYE'DE DİN, TOPLUM VE SİYASET 58 (2006).

21. See generally ELISABETH ÖZDALGA, THE VEILING ISSUE, OFFICIAL SECULARISM AND POPULAR ISLAM IN MODERN TURKEY (1998), for a study of different types of headcoverings in Turkish contexts, including the countryside.

22. M.H. YAVUZ, ISLAMIC POLITICAL IDENTITY IN TURKEY 8 (2003).

23. *Id.*

### ***Before the Republic***

Regulation of women's hair predates the current debates, and even certain systematic dissemination of Islamophobic rhetoric about Islam's inherent mistreatment of women in a way distinct from other religions and other legal systems. Since the 19<sup>th</sup> century, with the dissemination of Western European liberalism in Middle Eastern contexts, including Egypt, Turkey and Iran, Western perceptions of what covered hair meant was introduced to the Middle East intellectual discourse.<sup>24</sup>

For instance, in the Ottoman Empire, Turkey's predecessor, covered hair had been the norm for decades until the increasing influence of European ideas of what constitutes civilized and modern began shaping the image of what the new Turkish woman should look like. Muslim women generally have been subjects of societies accepting male interpretations of Islam, followed by Orientalist conceptions of "the Oriental woman." Ironically, the Orientalist view differed only slightly from the Islamic one. Islamic jurisprudence primarily discussed woman as a purely sexual being, whose actions were controlled by her unquenchable sex drive. According to this understanding, man had to control her sexuality if he were to run an efficient society. In other words, woman's sexuality uncontrolled would destroy society.<sup>25</sup>

The Orientalist view of "the Oriental woman" developed along similar lines. The Oriental woman was an irresistible beauty with animal-like sexuality. She was described as "both repulsive and alluring, crude and refined, disgustingly filthy and obsessed with bathing, unspeakably ugly and fabulously beautiful, ragged and elegant, shapeless and perfectly proportioned . . . a wily manipulator and a helpless prisoner, a scheming evil-doer and innocent as a child."<sup>26</sup>

Just like the Islamic jurisprudential conception of female sexuality, the Orientalist account saw "the Oriental woman" as a purely sexual being. Whatever limited mental capacity she had, she used it to further her needs based mainly on her sexuality. At the same time, "the Oriental woman" knew how to use her sexuality to get what she wanted and men were almost slaves to her sexual powers. Thus, "the Oriental woman" or the Muslim woman presented a danger to society in that her uncontrolled sexuality could lead to chaos.

### ***The Turkish Republic and the Kemalist Reforms***

Orientalist and Islamic theological views of the Muslim woman originated from different sources and served distinct purposes—justification for political moves, such as colonialism,

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24. See NILUFER GOLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* (1996), for a detailed account of how women's hair became a central point in modernization discourses in the Ottoman Empire and AHMED, *supra* note 16, for Ahmed's argument that in the Egyptian case, hijab became a symbol of resistance to colonialism.
25. See generally FATIMA MERNISSI, *BEYOND THE VEIL* (1987); Fatna A. Sabbah, *Woman in the Muslim Unconscious* (1984); Ziba Mir-Hosseini, *The Construction of Gender in Islamic Legal Thought: Strategies for Reform*, 1 HAWWA: J. OF WOMEN IN THE MIDDLE E. & ISLAMIC WORLD 1, 1-28 (2003).
26. Irvin Cemil Schick, *The Women of Turkey as Sexual Personae: Images from Western Literature*, in *DECONSTRUCTING IMAGES OF "THE TURKISH WOMAN"* 83-100 (Zehra F. Arat ed., 2000).

and theological jurisprudence, respectively. Their end results, however, were similar when it came to the nation-building process.

In Turkey, the nation-building elite consisted of Ottomans who were fluent in at least one European language, and mostly educated either in the West or in Western thought. These men had two conceptions of Ottoman women: Islamic and Orientalist. On the one hand, women had to be confined to the private sphere and their sexuality controlled. Yet the Orientalist narrative claimed that the Islamic social order was backward and barbaric, and if the Orient was to evolve in any meaningful way, it had to become European.<sup>27</sup> For the Turkish nation-building elite, the proof of the latter was that while the Ottoman Empire continued to lose most of its lands, the Europeans were expanding their empires by colonizing lands in Asia and Africa.

These elite accepted the image of the Orient offered by the Europeans. Their attitude was most apparent in the words of Mustafa Kemal, the leader of the nationalist movement, from a speech delivered on August 30, 1925:

In some places I see women who hide their faces and eyes by throwing a piece of fabric, a scarf, or something like that over their heads, and when a man passes by, they turn their backs to him or close up by sitting on the ground. What is the meaning or explanation of this behavior? Gentlemen, would the mothers and daughters of a civilized nation assume such an absurd and vulgar pose? This is a situation that ridicules our nation. It has to be corrected immediately.<sup>28</sup>

These words summarized the prevailing view that women's attire and attitude were matters of concern among the men whose task was to redefine their nation. These words from a man, the leader of the new nation, to other "gentlemen" symbolized how women, and specifically their hair, were to be the fundamental building blocks of the new nation — the de-Islamized, modernized, Westernized new nation. Women were the symbols of Europeanization since women's attire and status was a very visible sign of a difference between the Ottoman and the European.

This, however, did not mean women no longer threatened social order with their sexuality. On the contrary, the Kemalist elite was stuck between the Islamic idea of woman as the source of social chaos and the Orientalist idea of "the Oriental woman" as purely sexual. With the addition of the Orientalist perspective, not only was there a need to control female sexuality, but now, there was also a need to control its "Oriental nature" if the Westernization project was to succeed.

It was within this framework that the Kemalist elite embarked on reforms that would erase the visible Islamic nature of the new Turkish Republic, and would give women political

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27. See K. Pelin Basci, *Shadows in the Missionary Garden of Roses: Women of Turkey in American Missionary Texts*, in DECONSTRUCTING IMAGES OF THE "TURKISH WOMAN" 101-23 (Zehra F. Arat ed., 1998), for Orientalist narratives in the Turkish context; NIYAZI BERKES, THE DEVELOPMENT OF SECULARISM IN TURKEY 196-304 (1998) (discussing the Orientalist perception of the Ottomans and how the Ottoman intellectuals emulated these ideas); AHMED, *supra* note 16, at 144-68, for Orientalist narratives in the Egyptian context which are very much resonant of those in Turkey.

28. Zehra F. Arat, *Turkish Women and the Republican Reconstruction of Tradition*, in RECONSTRUCTING GENDER IN THE MIDDLE EAST: TRADITION, IDENTITY AND POWER 61 (Fatma Muge Goecek and Shiva Balaghi, eds., 1994).

rights. The new republic was declared in 1923. A new parliamentary system with representatives of the people was formed. What followed was a series of reforms aimed at transforming the newly conceptualized Turkish society at all levels.

The Kemalist reforms “eliminated or banned institutions of Islamic influence such as the Caliph and Islamic brotherhoods, and they placed all main Islamic institutions, including the mosques, under government control.”<sup>29</sup> Among the early reforms were closure of religious courts, centers for Sufi orders, and the abolishment of religious offices of the caliphate and sheik-al-Islam.<sup>30</sup> Western hats and clothing were legally mandated for men,<sup>31</sup> and the Islamic calendar was abandoned and replaced by the Christian calendar. Moreover, a modified version of the Latin alphabet replaced the Arabic alphabet used in the Ottoman Empire.<sup>32</sup>

Reforms impacting women’s status followed. While there was no clear law on female attire, the new state encouraged women to adopt Western style attire. Through state propaganda, newly founded educational institutions and Mustafa Kemal’s unequivocal statements, women were specifically encouraged to abandon any kind of veiling. In 1926, the Swiss Civil Code was adopted as the new Turkish Civil Code with a few modifications. This new code rendered Islamic personal laws void. Accordingly, polygamy was outlawed, and divorce was made available to both the husband and wife on similar grounds. Marriage in new Turkey would look very much like its European counterparts—at least on paper.<sup>33</sup> Furthermore, women gained the right to vote and hold office in municipal elections in 1930, and in national elections in 1934.<sup>34</sup>

Before the Kemalist reforms affecting women’s rights, there already existed a multi-layered Ottoman women’s movement with some circles framing their arguments around Islam, and others around Western liberal discourse.<sup>35</sup> The Kemalist reforms were not concerned with legitimizing these existing women’s movements or giving effect to their demands. Rather, nation building meant *modernizing*, which in turn meant becoming European, and women’s status was a major defining factor of being European. The Kemalist elite, therefore, adopted only the European definition of women’s rights: women in the public sphere, but only so far as to allow men to claim that they respected equality along liberal

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29. Seval Yildirim, *Aftermath of a Revolution*, 17 PACE INT’L L. REV. 347, 355 (2005).

30. The Constitution of the Republic of Turkey, Closure of Dervish Monasteries and Tombs, The Abolition of the Office of Keeper of Tombs and the Abolition and Prohibition of Certain Titles (Act No. 677 of 30 November 1341 (1925))(Turk.); see also Yildirim, *supra* note 29.

31. The Constitution of the Republic of Turkey, Wearing of Hats (Act No. 671 of 25 November 1341 (1925))(Turk.).

32. The Constitution of the Republic of Turkey, Adoption and Application of the Turkish Alphabet (Act No. 1353 of 1 November 1928))(Turk.); see also Nilufer Gole, *Modernist Kamusal Alan ve Islami Ahlak (Modernist Public Space and Islamic Morality)*, in İSLAM’IN YENİ KAMUSAL YÜZLERİ (NEW PUBLIC FACES OF ISLAM) (Metis ed., 2000), for discussion on the Kemalist reforms.

33. See Yildirim, *supra* note 29, for a detailed discussion of the various provisions on marriage and divorce in the 1926 Civil Code.

34. See Binnaz Toprak, *Dinci Sag [Religious Right]*, in GECIS SURECİNDE TÜRKİYE [TURKEY IN TRANSITION] 237-55 (Irvin Cemil Schick and E. Ahmet Tonak eds., 1992); see generally Yildirim, *supra* note 29 (providing a detailed discussion of the Turkish Civil Codes since the beginning of the Turkish Republic).

35. See generally AYNUR DEMİRDİREK, *OSMANLI KADINLARININ HAYAT HAKKI ARAYISININ BİR HİKAYESİ [A STORY OF OTTOMAN WOMEN’S SEARCH FOR RIGHT TO LIFE]* (1st ed. 1993).

lines. This also meant women had to distance themselves from religion and the way religion had defined them so far.

Kemalist reforms constructed and promoted an “ideal Turkish woman” as a foremost symbol of the new nation.<sup>36</sup> It was through this woman that the Kemalist elite hoped to find a place for the new Turkey among Western nations. “Kemalist woman served as a bridge between civilization and nation.”<sup>37</sup> Unfortunately, this approach to women’s rights was limited to legal change. Reforms were implemented and enforced by a top-down process which meant not only that the masses lacked an overall agreement with them, but also that the reforms never really reached their full purpose of radically transforming society.<sup>38</sup>

This is not to suggest that there was no secularization of the Turkish mind. The reforms were accepted among the urban elite in the early Republican era.<sup>39</sup> This social transformation, however, came with an acceptance of values because they were European, thus modern, and not because the masses gained an evolving awareness of gender equality.

In fact, the Kemalist reforms did not invalidate or negate the Islamic concept of the dangerous female sexuality. There was indeed a continued acceptance of this idea. Although the State encouraged women to enter the public sphere, the public woman was more a public “person.”<sup>40</sup> In other words, women were encouraged to enter the public sphere because they were human beings like men, and were, therefore, entitled to be in the public sphere. This right was not theirs as women, but as human beings. The new Turkish woman had to leave her sexuality, her womanness at home, in the private sphere. The presence of uncontrolled, or freely expressed female sexuality was still as dangerous to the social order as the earlier Islamic arguments had suggested.<sup>41</sup>

The Kemalist reforms failed to reconstruct the prevailing gender conceptions of the day. Even though the Kemalist elite wanted to distance the new nation from Islam and the social concepts linked to it, they failed to recognize the necessary conceptual and epistemological deconstruction to bring about reforms towards real gender equality.

### ***The 1982 Constitution***

Although the Turkish woman’s hair was a political issue since the initial conception of the Turkish Republic, it became a politico-legal battleground in the era following the 1980

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36. See NILUFER GOLE, *THE FORBIDDEN MODERN: CIVILIZATION AND VEILING* 14 (1996) (“Unlike most national revolutions, which define the attributes of an ‘ideal man,’ the Kemalist revolution celebrated an ‘ideal woman.’”). I think Gole must recognize that the concept of “the ideal woman” was central to other national reforms and revolutions in the developing world. For instance, state ideologies in post-colonial Egypt, Reza Shah’s Iran, Islamic revolution of 1979 in Iran, Maoist revolution in China and post-colonial India, all focused on issues surrounding women’s place in the social order that was being constructed. Therefore, although the Kemalist revolution may be a first, it is by no means the only nationalist ideology to make woman a revolutionary symbol.

37. *Id.* at 64.

38. See Yildirim, *supra* note 29.

39. GOLE, *supra* note 36, at 65.

40. *Id.* at 79.

41. *Id.* (“The cost of women’s liberation may be witnessed in the repression of her ‘femininity,’ which is perceived as a threat to the existing social order, and even of her ‘individuality,’ in both urban and public realms (education, labor, and politics).”).

military coup. The laws that define “public space” and ban all kinds of headscarves in this public space were all passed in this era. A new constitution was written, what was religious and private, as opposed to secular and public, were clearly defined and the State control over religion was affirmed. The headscarf once again gained importance similar to the nation-building era.

In 1980, a period of political turmoil led to a military coup, led by General Kenan Evren. In 1982, a new constitution was written, while the nation was still under military regime. Although the new constitution was affirmed by the public by a referendum, it was still the brainchild of the military regime. The 1982 Constitution is still in effect, albeit with a number of amendments, as discussed below.<sup>42</sup>

The Preamble to the Turkish Constitution puts clear emphasis on the secular nature of the republic: “there shall be no interference whatsoever by sacred religious feelings in state affairs and politics . . .” In outlining the characteristics of the Turkish Republic, Article 2 states its secular nature. Article 14 prohibits the use of any fundamental rights or freedoms to be exercised “with the aim of . . . creating discrimination on the basis of language, race, religion or sect, or of establishing by any other means a system of government based on these concepts and ideas.”<sup>43</sup>

Freedom of religion and conscience is afforded in Article 24 which states that “[a]cts of worship, religious services, and ceremonies shall be conducted freely, provided that they do not violate the provisions of Article 14.”<sup>44</sup> It adds that “[e]ducation and instruction in religion and ethics shall be conducted under state supervision and control,”<sup>45</sup> and that “[n]o one shall be allowed to exploit or abuse religion or religious feelings, or things held sacred by religion, in any manner whatsoever, for the purposes of personal or political influence, or for even partially basing the fundamental, social, economic, political, and legal order of the state on religious tenets.”<sup>46</sup>

In addition to these provisions, Article 174 mandates the preservation of reform laws enacted by the Kemalist revolutionaries. Among these reforms are those on Wearing of Hats and the Prohibition of the Wearing of Certain Garments, which prohibits religious attire. This law specifically applies to religious personnel wearing religious garments outside the scope of their religious duties.<sup>47</sup>

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42. In a 2010 referendum, the Turkish electorate approved various amendments to the Constitution. However, as the secularity of the state is an unalterable provision of the Constitution, the below discussion remains unaffected.

43. THE CONSTITUTION OF THE REPUBLIC OF TURKEY; *see also* Yildirim, *supra* note 15, for further discussion on the constitutional provision setting out the secular nature of the Turkish Republic.

44. *Id.*

45. *Id.*

46. *Id.*

47. THE CONSTITUTION OF THE REPUBLIC OF TURKEY, Article 174 (2) preserving Act No. 671 of 25 November 1341 (1925) on the Wearing of Hats, and Article 174 (8) preserving Act No. 2596 of 3 December 1934 on the Prohibition of the Wearing of Certain Garments.



### ***The Post-1980 Coup Era: Headscarf Battles between the Legislature and the Constitutional Court***

The first elections following the coup were held in November 1983. With the advent of the center right Anavatan Party, Turkey embarked on a path to liberalization and privatization. The elections brought a new charismatic prime minister, Turgut Ozal, who was known for his ties to one of Turkey's largest religious sects, the Nakshbendis.<sup>48</sup> At the same time, the leader of the military coup, Kenan Evren, took office as the President. Evren, like the military at large, was a strict Kemalist, who strongly believed that the secular system set in place by the founders of the republic had to be kept intact. He interpreted this to mean all religious symbolism should be kept out of the public sphere.

The first clash between the two heads of state was in 1987 when Evren passed a presidential instruction banning the use of headscarves in universities. Although the higher education authority had passed a similar ban earlier, implementation was lax and an increasing number of women were wearing various kinds of headscarves and veils.<sup>49</sup> With this presidential order, women who wanted to adopt the Islamic attire, and even men who wanted to grow their beards, were branded "fundamentalist."

As a response to the ban, "fundamentalists" held marches throughout Turkey.<sup>50</sup> In 1988, the Parliament, under Ozal's leadership, passed a bill lifting the ban.<sup>51</sup> Evren petitioned the Turkish Constitutional Court (TCC) arguing the law was unconstitutional for violating secularism.<sup>52</sup> Evren argued that at stake was the heart and soul of the Kemalist revolution that made Turkey the modern state that it is, and emphasized that "modern dress" lay at the heart of the Turkish state.<sup>53</sup> Covered hair could not be reconciled with modern dress and, consequently, with a secular society. TCC agreed. It emphasized that "[s]ecularism is the most significant Kemalist principle."<sup>54</sup> Since the Preamble to the Constitution mandates loyalty to Kemalist principles, no law could contradict the most significant of those principles. Furthermore, TCC found that any law deriving its mandate from religious belief or religious regulation violated secularism. Since the amendment in question allowed female students, educators and other personnel to cover their hair on the basis of their religious belief, it was in clear violation of the Kemalist principle of secularism.<sup>55</sup>

In late 1990, the Parliament passed another bill amending the same law as in the 1989 case. By then, Ozal was the president but the military remained the watchdog of politics and the Kemalist system. The amendment declared freedom of clothing and attire and gave

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48. See Niyazi Oktom, *Religion in Turkey*, 2 BYU L. REV. 371 (2002), for information on the various Islamic sects in Turkey.

49. *Islamic Headscarf Ban Divides Turkey*, THE GUARDIAN, Jan. 6, 1987.

50. *See Islamic Challenge to Turkey's European Aspirations*, FINANCIAL TIMES, Jan. 28, 1997.

51. *See* Turkish Constitutional Court Case no. 1989/1, Decision no. 1989/12 (Mar. 7, 1989) (questioning Law No. 3511, amending Law No. 2547, and stating, "Amendment 16: It is required to maintain a modern appearance and outfit in institutions of higher education, in classrooms, laboratories, clinics, polyclinics and corridors. It is permissible to cover the neck and hair with a cloth or a turban due to religious belief.").

52. *See id.*

53. *See id.*

54. *See id.*

55. *Id.*; see Yildirim, *supra* note 15, at 244-45, for further discussion on the case.

amnesty to those disciplinary sentences given for violating clothing and attire regulations.<sup>56</sup> The main opposition party petitioned the Court, arguing that the law attempted to override the Court's previous decision on the subject, and that it violated secularism. The Court found that since the law stated that the freedom of attire was subject to the laws in effect, and the Court's previous decision upheld the ban on headcoverings, the current amendment could not render headcoverings permissible. Thus, the first part of the amendment did not violate secularism. However, the amnesty given by the amendment could not withstand constitutional scrutiny, and was therefore abolished.<sup>57</sup>

### ***The Merve Kavakci Incident***

After these Court decisions, there was no other legal outlet left to challenge the headscarf ban. Following the 1996 parliamentary elections, Refah, a party popularly viewed as Islamist, formed a coalition government with a center right party, Dogruiyol. Refah was later forced out of government under the secularist military pressure, and later dissolved by the Court.<sup>58</sup> The members of the dissolved party formed the Fazilet Partisi (FP), which was elected to the Parliament in 1999.

The Turkish nation was caught off-guard with the events following the elections. For the first time in the republic's history, two women with headscarves were elected to the Parliament. A herd of political and security "experts" began predicting whether these women would remove their headscarves in the Parliament. If they did not, the herd opined, certain measures would be taken to prevent such a "threat" to Turkish secularism. Nesrin Unal of the right-wing nationalist Milliyetçi Hareket Partisi (MHP) announced that she would remove her headscarf in the Parliament. Merve Kavakci of Fazilet Party did not make any statements as to where her headscarf would be when she entered the Parliament for the first time to take the parliamentarian's oath.

On May 2, 1999, Merve Kavakci walked into the Parliament with her headscarf on her head. There was an immediate uproar in the Parliament. The new Prime Minister Bulent Ecevit of the social democratic Demokratik Sol Parti (SHP) jumped to the podium, in his hand a speech about the untouchable secular character of the Turkish Republic and how the sons and daughters of this nation would not stand by while the laws were stomped over by those looking to bring back the dark ages. As he was shouting to be heard, a majority of the Parliament, and all the female parliamentarians from the other parties, were continuously punching the desks and chanting "Out, out . . ." The Chair of the Parliament had to call a recess, at which point Kavakci left the Parliament without taking her oath. Outside awaited numerous women's and secularist groups holding signs against Sharia and for women's

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56. See Turkish Constitutional Court case no. 1990/36, Decision no. 1991/8 (Apr. 9, 1991) (questioning law No. 3670 (12), amending No. 2547, and stating, "Amendment 17: Clothing and attire are free in institutions of higher education, provided there is no violation of laws in effect. Temporary Subpart 1: All disciplinary sentences issued for violations of clothing and attire regulations are hereby abolished, with all their penalties and outcomes.").

57. See *id.*

58. Turkish Constitutional Court case no. 1/1, (Jan 1, 1998); see Yildirim, *supra* note 15, for further discussion on the TCC cases dissolving Refah and Fazilet.

rights. The crowd held candles and shouted slogans promising never to let Sharia come back to Turkish lands.<sup>59</sup>

Kavakci was later stripped of her Turkish citizenship for failure to report to the government and the election commission that she held dual citizenship in Turkey and the United States. Although she later regained her Turkish citizenship after marrying a Turkish citizen, she could never claim her seat in the Parliament as a result of having lost her citizenship following the election.<sup>60</sup>

### ***AKP and the Ongoing Matter of the Headscarf***

Approximately two years after the Kavakci incident, the Constitutional Court dissolved the FP for its violations of the secular laws. Among the cited reasons was Kavakci's attempt to disrupt the secular order.<sup>61</sup> Students continued to protest. Lower courts heard many cases of objections to the law. As the 2002 elections approached, and a new party, Adalet ve Kalkinma Partisi (AKP)<sup>62</sup> gained ground, the Turkish woman's hair was once again a matter of national concern. AKP alluded to Islam in many instances and its critics branded it an Islamist party. On November 3, 2002, the AKP won the elections by a landslide. It became the first party since Anavatan in the 1983 elections to be the sole governing party. In fact, only one other party, Cumhuriyet Halk Partisi, was elected to the Parliament, and remains the primary opposition party to date.<sup>63</sup>

AKP remains the governing party, enjoying a majority in the Turkish Parliament and has survived two additional national elections in 2007 and 2011. The new prime minister, Recep Tayyip Erdogan, and other male members of AKP attracted attention not only for their deeds in the government, but also because their wives covered their hair. With former AKP member, Abdullah Gul's election to President in 2007, the Turkish people are currently represented by a prime minister and a president whose wives and daughters all cover their hair out of religious conviction.

While this reality is undeniable, the initial stages of AKP's governance saw significant resistance from those who saw the headcoverings of politicians' wives as threatening to Turkish secularism at large. For instance, less than a month after his appointment as the Parliament Chair, Bulent Arinc and his wife, Munevver Arinc, went to a state ceremony. Ms. Arinc wore her headscarf to the ceremony. A week later, then President Ahmet Necdet Sezer, the former chief justice of the Constitutional Court, made a statement to express his discomfort, "It is unnecessary to make the headscarf a matter of public debate again."<sup>64</sup> He

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59. Personal recollection. As most concerned Turks, I watched the entire melodrama on live television; see also MERVE SAFA KAVAKCI, BASORTUSUZ DEMOKRASI [Democracy without a Headscarf] (Emine Eroğlu ed. 2004), for Kavakci's own recounting of the events surrounding this incident.

60. See generally, *id.*

61. Turkish Constitutional Court case no. 2/2 (June 22, 2001).

62. Adalet ve Kalkinma Partisi translates as Justice and Development Party.

63. See Ahmet Insel, *The AKP and Normalizing Democracy in Turkey*, 102 2/3 THE S. ATLANTIC QUARTERLY, 293-308 (2003), on the AKP and its current term.

64. *Sezer'den Turban Uyarisi*, NTV NEWS, Nov. 24 2002, <http://www.ntvmsnbc.com/news/189340.asp>.

reminded the Turkish public of the Court's decisions on the headscarf and emphasized that the Court had said the conclusive and the last words on the matter.<sup>65</sup>

The headscarf "issue" resurfaced with a much-anticipated reception traditionally given by the Parliament Chair. President Sezer, the leader of the opposition party, and some military leaders, announced that they would not attend the reception because Ms. Arinc's attendance was anticipated.<sup>66</sup> In the end, Ms. Arinc did not attend the reception.<sup>67</sup> In the Parliament Opening Ceremony in September 2003, Ms. Arinc's name was not included, presumably to avoid a similar frenzy. This time, there was no boycott by the political and military leaders.<sup>68</sup>

The President's Republic Day Ball was another event for the headscarf. President Sezer sent two kinds of invitations: those whose wives wear the headscarf received invitations for one, whereas those who do not cover their hair, or whose wives do not cover their hair, received invitations for two. Among those who received invitations for one were parliament members and judges, most of whom did not attend the ball.<sup>69</sup> It was their turn to boycott.

After the politicians, the judges joined the fight against the headscarf in their courtrooms. Only a week after the Presidential Ball, an Appeals Court judge, Fadil Inan, asked a defendant to leave the courtroom because she was wearing a headscarf.<sup>70</sup> Chief Justice of the Appeals Court, Eraslan Ozkaya, defended Inan's decision, arguing that the courtroom is a public space, and therefore a space in which the headscarf cannot be tolerated.<sup>71</sup> Within days of this incident, two defendants entered two other courtrooms with their headscarves and were allowed to proceed with their cases without a mention of their hair. At the same time, however, the Ankara Bar Association issued disciplinary complaints about three lawyers for entering the courtroom with headscarves.<sup>72</sup>

In 2008, the legislature made another attempt to lift the *hijab* ban in universities. Law No. 5735, Section 2 stated that "No person shall be deprived of his/her right to higher education except for reasons explicitly stated in law. The parameters of this right [to higher education] are determined by law."<sup>73</sup> Within weeks, 112 members of the opposition party petitioned the

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65. *Id.*

66. *Polemige Katkisi Olani Milletimiz Affetmez*, NTV NEWS, May 23, 2003, <http://www.ntvmsnbc.com/news/212345.asp>.

67. *Arinc Tansiyonu Dusurdu*, NTV NEWS, May 23, 2003, <http://www.ntvmsnbc.com/news/212179.asp>.

68. *Arinc'tan Yeni Resepsiyon Krizine Onlem*, NTV NEWS, Sept. 21, 2003, <http://www.ntvmsnbc.com/news/234982.asp>.

69. *AKP'den Resepsiyona Boykot*, NTV NEWS, Oct. 28, 2003, <http://www.ntvmsnbc.com/news/241197.asp>.

70. *Turban Mahkeme de Yasak*, MILLIYET, Nov. 7, 2003, <http://www.milliyet.com/2003/11/07/siyaset/siy02.html>.

71. *Turban Tartismasi Mahkeme Salonuna Tasindi*, NTV NEWS, Nov. 7, 2003, <http://ntvmsnbc.com/news/242789.asp>.

72. *Mahkemelerde Turban Serbest*, MILLIYET, Nov. 11, 2003, <http://www.milliyet.com.tr/2003/11/11/siyaset/siy20/html> (Turk).

73. Author's translation from Turkish. 5735 Türkiye Cumhuriyeti Anayasasının Bazı Maddelerinde Değişiklik Yapılmasına Dair Kanun (Law 5735 Amending Certain Articles of the Constitution of the Republic of Turkey), T.C. RESMİ GAZETE [OFFICIAL GAZETTE OF REPUBLIC OF TURKEY], Feb. 23, 2008, available at <http://www.resmi-gazete.org/rega/5735-turkiye-cumhuriyeti-anayasasinin-bazi-maddelerinde-degisiklik-yapilmasina-dair-kanun-10157.htm>.

Constitutional Court to annul the new law.<sup>74</sup> The Court found that although the law was written in general terms without referencing *hijab*, based on legislative discussions on the law and the fact that the law was casually referred to as “Turban Yasasi (*hijab* law)” by the mass media, its actual and sole aim was to lift the ban on religious attire and specifically *hijab* in universities. In annulling the law, the Court referenced its above-discussed earlier decisions on *hijab* and reiterated that religious coverings cannot be reconciled with a secular state as understood in the Turkish Constitution based on Kemalist reforms. The Court further found that religious symbols like *hijab* might violate human rights of others by imposing religious views and even constituting religious coercion. The Court also relied on ECHR opinions in the *Leyla Sahin v. Turkey*, *Dahlab v. Switzerland*, and *Refah Partisi v. Turkey* cases and stated that even an international human rights court agreed that *hijab* prohibition did not violate human rights.<sup>75</sup>

In the September 2010 referendum, 57.88% of the Turkish citizenry approved various amendments to the Turkish Constitution, with 42.12% rejecting them.<sup>76</sup> Among the changes that will be realized as a result of the amendments are the creation of an individual right to petition the Constitutional Court<sup>77</sup> and the right to appeal military court decisions to civilian courts. These changes might hold positive improvements for Turkish women who seek a place in the public sphere without sacrificing their beliefs. In fact, the Chair of Higher Education Committee, Yusuf Ziya Ozcan, has already indicated that universities should not prevent female students from entering school premises simply because of *hijab*. His permissive statements have led to various universities relaxing the ban. Today, the *hijab* ban is enforced by some universities only.<sup>78</sup> With AKP’s recent win at national election in June 2011, the headscarf ban is certain to remain a topic of political battles in Turkey.

### ***Elsewhere in the World...***

Turkey is not the only Muslim-majority country with laws prohibiting *hijab* in schools and other public spaces. Tunisia, Azerbaijan, Albania and Kosovo also prohibit *hijab* for grade and high school students. Syria and Egypt ban veils that cover faces from educational institutions.

Countries where Muslims are a minority have varying laws regarding the regulation of *hijab* and veils. An increasing number of Western European jurisdictions are implementing laws that prohibit *hijab* in schools for students and/or teachers, while others are targeting face-covering veils by recent laws that prohibit them in all public spaces. Invariably, the

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74. Turkish Constitutional Court Case no. 2008/16, Decision No. 2008/116 (May 6, 2008) (R.G.22.10.2008 No. 27032).

75. *Id.*

76. See Supreme Election Board of Republic of Turkey Decision No. 846, OFFICIAL GAZETTE OF REPUBLIC OF TURKEY, Sep. 22, 2010, available at <http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2010/09/20100923.htm&main=http://www.resmigazete.gov.tr/eskiler/2010/09/20100923.htm>, for official results of the referendum.

77. Under the 1982 Constitution, there is no individual standing before the Turkish Constitutional Court. See Yildirim, *supra* note 15, at 110, for further analysis of the court’s jurisdiction under the 1982 Constitution.

78. *Turban Üniversiteleri İkiye Bölündü*, MYNET HABER (Oct. 16, 2010) (Turk.), <http://haber.mynet.com/detay/guncel/turban-universiteleri-ikiye-bolundu/537308>.

reasons cited for the laws involve the democratic secular characteristic of these societies, and the inherent gender inequality symbolized by both the *hijab* and veils. In the face of criticism that these prohibitive laws are products of xenophobia, sectarianism, Islamophobia and racism (which is alive and well in Western Europe), often the response is that *hijab* and veils are mandates of a religious understanding that deems women's sexuality suspect, thus seeking to cover women, in turn demeaning them. Such gender discrimination has no place in secular democracy, and must thus be regulated. This logic, never fully explained, without actual proof that revealed hair is somehow more significant to a woman's liberation and freedom than other parts of her body, or proof that there is a correlation between revealing flesh and intellectual freedom, has been accepted as Truth not just by those advocating for State-enforced prohibition, but also by the courts — domestic and international.

Another theme that runs through Western European *hijab* debates is that of assimilation. In a rather fascistic spirit, prohibitive laws are justified as effective mechanisms to ensure that immigrant populations (*i.e.*, outsiders) assimilate to secular democratic Western European societies. How forcing a girl or a woman to reveal her hair might change their presumed views on society generally and gender equality specifically remains unclear. Regardless, assimilation to secular democracy remains another primary argument frequently made by proponents of prohibitive laws and accepted by many a court.

### **Part III: *Hijab* as an International Human Right (?)**

Ideally international law is the ultimate law that would safeguard human dignity and ensure that a global order is established for all the members of the world community. However, in its current Westphalian form, with sovereign nation states as the primary legitimate actors, it fails to meet the challenge of being the law for all. Prohibition placed on women's bodies, presented as a necessity of a world with globalization, globalized and globalizing values remain contradictory to the ideal of international law that claims to safeguard the dignity of all. Perhaps an initial critique must begin with questioning whether globalization is in fact a reality, in that whether the concept of globalization has done what it claims, whether it has brought more of the world into a state of similar existence that goes beyond listening to the same songs and watching the same Hollywood stars via tele-technology. Perhaps, as Jacques Derrida stated in a 2003 interview, "globalization hasn't occurred. It is a false concept, often an alibi; never has the world been so unequal and so marginally shareable or shared."<sup>79</sup> As Derrida argued, the rise in the number of *hijab* prohibitive laws (as well as *hijab* mandating laws in Muslim majority contexts), coinciding with a global rise in right-wing movements, constitutes a stark sign that the world has a long way to go before the magical egalitarianism liberal democracy and globalization promise is in fact realized. Such realization "will occur only through the creation of a new international law,"<sup>80</sup> with new understandings of the differences that constitute the global community.<sup>81</sup>

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79. MUSTAPHA CHÉRIF, *ISLAM & THE WEST: A CONVERSATION WITH JACQUES DERRIDA* 62 (Mark C. Taylor et al. eds., Teresa Lavender Fagan trans., 2008).

80. *Id.* at 45.

81. *Id.*

For instance, the *hijab* prohibitive discourses ignore rather significant questions: why is it only Muslim women who seek to participate in public space while covering their hair and even their faces? Where are the other religious conservative women whose religious systems traditionally place them in the home only? Is there something subversive and even woman-empowering about a covered woman participating in life outside the home, when traditional Islamic law has mandated that women stay in the home?

As the cases below indicate, current prohibitive discourses fail to consider these very important questions, which challenge the truth of the covered Muslim woman as weak and oppressed. Only with advances in urbanization, space for more groups of citizens, women of various socio-political and economic backgrounds are seeking to participate in public space. For example, there are no Amish women who sue to cover their hair while teaching in public schools, or Amish girl children seeking to cover their hair in public schools, because the Amish traditionally do not participate in public space. The denials of these complexities in turn deny covered Muslim women their subversive effect in both Muslim communities and secular democratic society at large.<sup>82</sup> This is further evidenced by the fact that the primary spaces in which the *hijab* debates arise are schools and workplaces. This is also evident from the brief discussion by the *Sahin* court—headscarves for pupils are prohibited primarily in Muslim majority contexts (Turkey, Tunisia, Azerbaijan, Albania, Kosovo). Another point of complexity left unrecognized in current debates is the State's utilization of the female body to define the meaning of citizenship and national identity.

### ***ECHR Decides***

The jurisprudence of the European Court of Human Rights on the issue of Muslim headscarves in public space has been consistent and coherent. Unfortunately, the ECHR has consistently and persistently found that the Muslim headscarf is inherently a sign of gender discrimination and that its presence in public spaces may reasonably be interpreted as posing a threat to secular and democratic principles as well as public peace and safety. As a signatory to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention), Turkey has been before the ECHR a number of times to face challenges to its *hijab* prohibitive laws. Although the ECHR refused to hear earlier cases, its 2005 decision in *Sahin v. Turkey* stands as the primary case by an international tribunal upholding *hijab* bans in the name of protecting secular liberal democracy.

Article 9 of the Convention is the primary article guaranteeing religious freedom. Under the article, “[e]veryone has the right to freedom of thought, conscience and religion,”<sup>83</sup> but this right is subject to “such limitations as are prescribed by law and are necessary in a

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82. For a similar argument, see *Accommodation Tangles in the Laws About Hair*, in *LAW AND RELIGION: CASES IN CONTEXT* (Leslie C. Griffin ed., 2010) (discussing two cases from the United States where state and federal courts have upheld *hijab* prohibitions: *Freeman v. Dept. of Highway Safety & Motor Vehicles*, 924 So. 2d 48 (Fla. Dist. Ct. App. 2006) and *Webb v. City of Philadelphia*, 562 F.3d 256 (3d Cir. 2009). Along with Jeffrey M. Pollock, I represented Ms. Webb in her appeal seeking her right to wear her religious head-covering under her police uniform hat.

83. European Convention on Human Rights accessible in English at [http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION\\_ENG\\_WEB.pdf](http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/CONVENTION_ENG_WEB.pdf)

democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.”<sup>84</sup>

Though at first glance the provision is logical and appears to include the necessary flexibility for fringe scenarios where a religion might require actual harm to others, in application, it has been interpreted to uphold *hijab* bans as necessary in secular liberal democracies.

As early as 1993, in *Karaduman v. Turkey*, a committee of the ECHR reviewing the admissibility of a complaint by a Turkish university student held that a secular university could ban *hijabs* and deny services to students who refuse to reveal their hair and that such policy was not in violation of Article 9. The committee found the complaint inadmissible on procedural grounds, but as to the Article 9 complaint, it stated that “having regard to the requirements of a secular university System, that regulating students' dress and refusing them administrative services, such as the issue of a degree certificate, for as long as they fail to comply with such regulations does not, as such, constitute an interference with freedom of religion and conscience.”<sup>85</sup>

In 2001, Lucia Dahlab, a Swiss teacher, petitioned the ECHR challenging the *hijab* ban in Switzerland. Dahlab was a convert to Islam and wanted to continue to teach while wearing *hijab*.<sup>86</sup> The Swiss government claimed that “the Islamic headscarf was a powerful religious symbol” but did not explain just what made the *hijab* a “powerful” religious symbol as opposed to a weak one. Nor did the Swiss government discuss the presence of other religious symbols. The ECHR accepted the Swiss government’s arguments. It stated that *hijab*

appears to be imposed on women by a precept which is laid down in the Koran and which . . . is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.

Consequently, the ECHR concluded that the *hijab* prohibition imposed on teachers was necessary in a democratic society, thus satisfying the terms of Article 9.

Two years later, the ECHR upheld TCC’s dissolution of a political party, Refah Partisi, on the grounds that it had violated the principle of secularism.<sup>87</sup> Refah Partisi argued that the dissolution decision violated the Convention Articles 10 and 11, protecting freedoms of expression and assembly, respectively.<sup>88</sup> TCC had dissolved Refah accepting allegations that the party had become a center of anti-secular activities, aspiring to a religiously governed Turkey instead. At the center of the allegations and TCC’s reasoning were instances of Refah parliamentarians expressing their disagreement with the *hijab* ban. Accepting TCC’s

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84. *Id.*

85. *Karaduman v. Turkey*, App. No. 16278/90 Eur. Comm’n Dec. & Rep. (1963).

86. *Dahlab v. Switzerland*, App. No. 42393/98 Eur. Ct. H.R (2001).

87. *Refah Partisi and Others v. Turkey*, App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98 Eur. Ct. H.R (2003).

88. See Turkish Constitutional Court Case no. 1997/1, Decision no. 1998/1, (Jan. 16, 1998), and its successor Fazilet Partisi, Case no. 1999/2, Decision no. 2001/2, (June 22, 2001), for a discussion of the Turkish Constitutional Court case dissolving Refah Partisi; see also Yildirim, *supra* note 15, at 242-44.



reasoning, the ECHR based its decision on the general incompatibility of an Islam-based politico-legal system and democracy. Since members of Refah had clearly expressed a longing for a legal system with no *hijab* ban, no anti-polygamy laws, and even a possible plurality of personal laws based on religion, the ECHR had ample evidence that Refah's dissolution was necessary to safeguard democracy, despite the fact that neither Refah nor its members had actually undertaken any particular act besides giving speeches and participating in rallies supporting various causes, including the lifting of the *hijab* ban. Although this case is primarily about party dissolution, it reflects ECHR's general bias against Islam as a religion of inequity. In its references to the *hijab* ban, the ECHR simply cites to the *Karaduman* decision to reiterate that universities can enforce *hijab* bans without violating religious freedom under the Convention. In this case, the ECHR made clear that Islam as a religion itself might constitute a threat to democracy, as simply believing in Islam and wishing for a politico-legal system where Islamic symbols and institutions are not prohibited could be proxies for "Islamic fundamentalism."<sup>89</sup>

In concluding that the TCC had decided properly, the ECHR cited to its precedent to emphasize "the State's role as the neutral and impartial organizer of the religious harmony and tolerance in a democratic society," and that "the State's duty of neutrality and impartiality is incompatible with any power in the State's part to assess the legitimacy of religious beliefs." Ironically, that is exactly what the TCC had done in dissolving Refah and that is also exactly what the ECHR did in finding no violation of the Convention.

ECHR's view of any belief in Islam as a potential proxy for Islamic fundamentalism is also clear in the *Sahin v. Turkey* decision.<sup>90</sup> Leyla Sahin, a medical student, had attended medical school while in *hijab*. After the university administration issued a regulation banning *hijab*, Sahin was denied access to her examinations and prevented from further enrolling in classes. The university administration then brought disciplinary charges against her for refusing to remove the headscarf and attending protests regarding the *hijab* ban. Sahin enrolled in medical school at Vienna University and petitioned the ECHR alleging violations of Article 9 among other provisions of the Convention. The ECHR found that the *hijab* ban in universities violated Sahin's freedom of religion under Article 9(1), but that the Turkish State's purpose of "protecting rights and freedoms of others and [] public order" was a legitimate purpose necessary in a democratic society, thus constituting a valid exception under Article 9(2). Citing to its earlier decisions in *Karaduman*, *Dahlab* and *Refah*, the ECHR again referred to the inherent function of "the State's role as the neutral and impartial organizer of the exercise

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89. Although he concurred in the outcome, Judge Kovler expressed concern over the Court's hasty conclusions about Islam:

What bothers me about some of the Court's findings is that in places they are unmodulated, especially as regards the extremely sensitive issues raised by religion and its values. I would prefer an international court to avoid terms borrowed from politico-ideological discourse, such as "Islamic fundamentalism" (para. 94 of the judgment), "totalitarian movements" (para. 99 of the judgment), "threat to democratic regime" (para. 107 of the judgment), etc., whose connotations in the context of the present case, might be too forceful.

See *Karaduman* App. No. 16278/90 (Kovler, J., dissenting).

90. *Leyla Sahin v. Turkey*, App. No. 44774/98 Eur. Ct. H.R. (2005).

of various religions, faiths, beliefs” and that “this role is conducive to public order, religious harmony and tolerance in a democratic society.”<sup>91</sup>

Quoting directly from the Grand Chamber’s decision below, the ECHR further noted “the emphasis placed in the Turkish constitutional system on the protection of the rights of women . . . Gender equality—recognized by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe.” A further quote from the Grand Chamber’s decision comments that Turkey is a “country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith.” Thus, if some women are allowed to cover their hair in public spaces like universities, then those who choose not to cover might feel pressure or even coerced to eventually cover their hair. In other words, Sahin’s claim that the Turkish state has interfered with her religious freedom must first and foremost be analyzed not in terms of how she is affected, but in terms of how others *might* be affected if certain hypothetical concerns materialize.

A later petition to the ECHR came from Sabire Kose and numerous other secondary school pupils at state-funded religious schools, as well as their parents.<sup>92</sup> The pupils, female students wearing *hijab*, were denied access to school grounds unless they removed their *hijabs*. The petitioners alleged a violation of Article 9 among other provisions of the Convention. They argued that the *hijab* ban violated Article 14 of the Convention prohibiting discrimination on basis of religion and sex. They alleged that the ban targeted only practicing Muslims and thus constituted religious discrimination. They also alleged that the ban constituted sex discrimination because “Muslim boys were able to study in State schools without being subjected to any form of ban.”<sup>93</sup> In its review of the Article 9 complaint, the ECHR simply referred to its holding in *Sahin* and thus concluded that the *hijab* ban issue had been settled, and bringing a settled issue before the ECHR violated admissibility criteria as manifestly ill-founded under Article 35 (3) of the Convention. The ECHR rejected the Article 14 discrimination claim also as manifestly ill-founded, stating that dress code requirements in schools had the manifest purpose to “preserve neutrality and secularism within schools – thus protecting adolescents at an age when they are impressionable – and to protect the interests of the education system.”<sup>94</sup>

The ECHR’s most recent decisions regarding a *hijab* ban were *Dogru v. France* and *Kervanci v. France*, decided on the same day.<sup>95</sup> Both Belgin Dogru and Esmâ-Nur Kervanci were French school children who wanted to wear a *hijab* while attending physical education

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91. *Id.* para. 107.

92. Kose and Others v. Turkey, App. No. 26625/02 Eur. Ct. H.R. (2006). Imam Hatip schools are state-funded and regulated religious secondary schools. Originally formed to raise religious clergy for the state, the schools have been greatly limited in recent years. For instance, since 1997, these schools are only 4 years serving in effect as high schools only, whereas before then they provided post-elementary schooling. Moreover, a 2009 law provides that Imam Hatip graduates are only eligible to continue their higher education in theology departments at the university level.

93. *Id.*

94. *Id.*

95. Dogru v. France, App. No. 27058/05 Eur. Ct. H.R. (2009); Kervanci v. France, App. No. 31645/04 Eur. Ct. H.R. (2009).

classes. Employing similar reasoning as in *Sahin*, the ECHR found that the French state could limit the children's religious practice as necessary in a democratic society. Discussing the particular nature of French society and French secularism, *laïcité*, the ECHR concluded that the French law had the legitimate aim of "protecting the rights and freedoms of others, public order and public safety."<sup>96</sup> The ECHR also incorporated from *Dahlab* its understanding of *hijab* as an inherent symbol of gender inequality.<sup>97</sup> As a result, the *hijab* ban is a mere consequence of secular school regulations requiring certain limitations on attire, and not meant to target Muslim school children.

### ***Making Sense of It?***

The above cases share a few common themes in interpreting the scope of Article 9 freedom of religion as it extends to *hijab*. First, inherent in the ECHR's reasoning and explicit in its explanations is the idea of a State that is neutral and impartial. This impartial and neutral State is explicitly referenced in all the cases, in explaining why certain restrictions on religious freedom might be necessary in the eyes of an impartial and neutral State that is charged with safeguarding the rights of the many with diverse views and beliefs. How the State, which is presumably secular, is neutral and impartial is unexplained. Moreover, the concepts of impartiality and neutrality are used uncritically, with a presumption that one who knows secular democracy must understand that the State will be neutral and impartial. This philosophical immaturity in thinking that the State is a neutral entity robs the ECHR of its legitimacy as the presumed protector of human dignity and the guardian of rights so precious to those singled out by the law. A state is born of an ideology as evidenced in the respective Constitution that gives it life. For instance, the *Dogru* court points out that France, Turkey and Switzerland are states where "secularism is a constitutional principle." Thus, by definition, the State in these countries is *not* neutral or impartial. Clearly the ECHR uses a short hand to imply that the State in a secular democracy may not favor one religious group over another, and at times must act as the mediator between various groups. The State as a political entity, however, constituted of individuals elected through political processes, is not the kind of neutral and impartial entity of which the ECHR speaks. As is evident in the *hijab* cases before the ECHR, the State acts with partial (for revealed hair as the norm), prejudiced (against Islam and Islamic symbols) and very much political might.

A second theme in the ECHR's decisions is that of an Islam that is inherently a threat to secular democracy. *Hijab* worn by individual girls and women is equated with Islam as a political force, which in turn is equated with a threat referred to as Islamic fundamentalism—never clearly defined, never clearly confronted, but just alluded to and all those instances of implications to its dangers unquestioningly accepted by the ECHR.

A third theme is that of gender equality as an inherent part of secular democracy and *hijab* as inherently contradictory to gender equality. The ECHR does not expand on this theme but explicitly states in the cases, as if it should be obvious to those who know secular

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96. *Dogru*, App. No. 27058/05 para. 64; see also *Kervanci*, App. No. 31645/04 para. 64.

97. *Dogru*, App. No. 27058/05 para. 64; see also *Kervanci*, App. No. 31645/04 para. 64.

democracy, that if a woman covers her hair out of religious conviction, that religion must be one of gender inequity. There is never any discussion as to why covered hair is inherently different than other covered body parts, or why hair covered for religious purposes is inherently different than hair covered for other reasons, such as recovery from chemotherapy, or protection from cold. The ECHR presumes that there can only be one definition of gender equity, and to be gender equal, all citizens in all secular democracies must share a uniform understanding of gender equity which is then implemented in the same way by secular democratic States. Perhaps the ECHR should heed Janet Halley's suggestion and take a break from feminism, as it understands it, and let individual girls and women define for themselves how to constitute dignity in their lives. The ECHR's idea of gender equality robs the *hijab* wearing girls and women of any meaningful choice of control over their bodies. Ironically this theft is in the name of protecting these women from the coercive forces in their Muslim families and communities, not to mention their religion. Accepting that there are instances of such coercion in families and communities over issues as diverse as headcoverings, gender identity, or political opinion, how State coercion is preferable to familial or societal coercion is unclear.

In her dissent in the *Sahin* case, Judge Tulkens points out Leyla Sahin wore the *hijab* of her own free will, and that there is no reason to doubt her statement. Judge Tulkens fails

to see how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights, which must remain under the control of those who are entitled to benefit from them.<sup>98</sup>

As Judge Tulkens correctly identifies, the ECHR affirms State paternalism in determining how a gender equal woman behaves and what she looks like, in the meantime building barriers to girls' and women's access to education, as well as a variety of other jobs.

Yet another problematic theme that runs throughout the ECHR's *hijab* jurisprudence is that *hijab* is a political and religious symbol and not just an individual choice based on belief and faith. As such, it is "a powerful religious symbol"<sup>99</sup> which can be suggestively coercive and make those around it uncomfortable. It threatens public order. The challenges to *hijab* bans are no longer about the rights of the individual women asserting them, but rather about the rights of those who do not cover their hair. Even presuming the State could be neutral and impartial, the ECHR's reasoning that shifts the benefit of an individual right (religious freedom) to those who already have it renders the State partial to upholding and enforcing an already established norm. This is problematic in a context like Turkey where the norms have been created primarily through a top-down process with ongoing resistance from various sections of the masses. It is also problematic in contexts where Muslims are religious minorities and the discourses around *hijab* are necessarily diluted by other ideological undercurrents such as xenophobia and racism.

From the absurdity of trivial events that took place in Turkey to eliminate the headscarf from the public eye (some of which are recounted in Part II of this paper) to the overt failure

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98. Leyla Sahin v. Turkey, App. No. 44774/98 para.12, Eur. Ct. H.R. (2005) (Tulkens, J., dissenting).

99. Dahlab v. Switzerland, App. No. 42393/98 Eur. Ct. H.R. (2001).

of an international judicial body to recognize its own bias against a religion, the Muslim woman's headscarf has done much more than one could imagine a few centuries ago. Although there are undeniable instances of Muslim women and girls being coerced and forced to cover their hair and their bodies, the way to battle such coercion cannot be through approval and advocacy of state coercion to uncover Muslim women's hair and bodies. In the end, the law must do more than prohibit and punish—in fact, international human rights law claims to protect and ensure dignity of all individuals. In the case of the Muslim woman's headcoverings, however, international law has failed to live up to its ideals. Once again remembering Derrida's sentiment, an egalitarian world will not be a viable dream until the "creation of a new international law"<sup>100</sup> that recognizes the complexities of the human being, of identity, of inclusion and exclusion, as well as the workings of Power and norm-creation. That international human rights discourse has generally accepted the undesirableness of covered hair, and it has done so at a time when Muslims and Islam continue to be the global evils, shows that we are far from Derrida's imagined global community.

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100. CHÉRIF, *supra* note 79.